APPENDIX A

Opinion

(May 10, 1962)

Grant H. Bagley (Walter L. Budge, Attorney General, State of Utah, Clifford L. Ashton, and Van Cott, Bagley, Cornwall & McCarthy were with him on the brief) for Appellants.

Parker M. Neilsen, Assistant United States Attorney (Ramsey Clark, Assistant Attorney General, William T. Thurman, United States Attorney, C. Nelson Day, Assistant United States Attorney, Roger P. Marquis, and A. Donald Mileur, Attorneys, Department of Justice, were with him on the brief) for Appellee.

Before BRATTON, HUXMAN, and BREITENSTEIN, Circuit Judges.

BRATTON, Circuit Judge:

In United States v. Utah, 283 U.S. 64, sometimes hereinafter referred to as the earlier case, it was determined that the San Juan River from the mouth of Chinle Creek downstream to its confluence with the Colorado River, a distance of 133 miles, was non-navigable at the date of the admission of Utah to the Union on January 4, 1896. That case was decided in 1931.

In 1959, the United States instituted in the United States Court for Utah this action to quiet title in the United States to the land constituting the bed of the San Juan River in Utah from the boundary line between Colorado and Utah downstream to the mouth of Chinle Creek, a distance of approximately 55 miles, subject to rights of third parties not having pertinency here. Utah, George D. Fehr, Earl E. Fehr, Joe Lyon, Jr. and United Western Minerals Company,

a corporation, were joined as parties defendant. By answer, Utah asserted ownership of such land, subject only to mineral leases which it had executed to the defendants George D. Fehr and Joe Lyon, Jr.; and by counter-claim it sought to have its title thereto quieted. By answer, the defendants George D. Fehr, Earl E. Fehr, Joe Lyon, Jr. and United Western Minerals Company, asserted interests in the land under mineral leases issued by Utah; and by counter-claim, they sought to have such interests quieted. A stipulation was filed in the case in which it was agreed that the first issue to be determined was whether the segment of the river in question was navigable at the time Utah was admitted into the Union. It was further agreed that if it was determined that the river between such points was not navigable at that time, no other issues remained in the case. And it was further agreed that if it was determined that the river between such points, or any significant part thereof, was navigable on such date, certain other issues would emerge for consideration. A pretrial order was entered that there would first be a trial and determination of the question of navigability of the stream between the two points mentioned. The case was tried upon the sole issue of navigability. The court found and determined that no significant part of the river between the two points was navigable at the time Utah was admitted into the Union. Judgment was entered quieting title in the United States, and the appeal is from that judgment.

Title to the land constituting the bed of the San Juan River within Utah passed to the State when it was admitted to the Union if the river was then navigable; and it was not navigable, title remained in the United States. United States v. Utah, supra.

While applying the rule sometimes presents difficulty, it has been held without deviation over a long period of time that the test for determining the question of navigability of a river is whether the stream in its natural and ordinary condition is used or is susceptible of being used as a channel for commerce over which trade and travel is conducted or may be conducted in the customary modes on water. The Daniel Ball, 10 Wall. 557, 563; The Montello, 20 Wall. 430; United States v. Rio Grande Dam and Irrigation Co., 174 U. S. 690, 698; United States v. Cress, 243 U.S. 316; Economy Light & Power Co. v. United States, 256 U.S. 113, 121; Oklahoma v. Texas, 258 U.S. 574, 586; Brewer Oil Co. v. United States, 260 U.S. 77, 86; United States v. Holt State Bank, 270 U.S. 49, 56; United States v. Utah, supra; United States v. Oregon, 295 U.S. 1, 14; United States v. Appalachian Electric Power Co., 311 U.S. 377, 406. Navigability does not depend upon the mode or modes by which trade and travel is conducted upon the stream, but upon whether the stream in its natural condition is one which affords a channel for useful commerce. Brewer Oil Co. v. United States, supra. And navigability, in the sense of law, is not negatived or destroyed merely because of watercourse interruption caused by occasional natural obstructions or portages. *Neither is it essential* to navigability that the stream be open to navigation at all seasons of the year, or at all stages of the water. Economy Light & Power Co. v. United States, supra; United States v. Appalachian Electric Power Co., supra. But the general rule which emerges clearly from these cases considered collectively is that in order to be navigable in fact and in law, a river in its natural and ordinary condition must be used or be susceptible of use as a channel for commerce in one or more of the customary modes of trade and travel by water.

The substance of the major attack upon the judgment is that, tested by the general rule for determining navigability of a stream, there was insufficient basis of fact for the finding and determination that the San Juan River in the area in question was not navigable at the time Utah was admitted into the Union. The trial was extended and the evidence was voluminous. Some of the witnesses were aged persons with personal knowledge of parts of the stream area in question in the late years of the last century and the early years of the present century; and the testimony given by some witnesses at the trial of the earlier case with like knowledge was read in evidence. In general, the testimony of such witnesses concerning the river related to volume, flow, width, depth, irregularity, floods, dry periods, sediment content, quick-sand, sand bars, sand waves, shifts in channel, braided channel, freezes, use of boats, ferrying in going to and from trading posts, crossing on foot, crossing on horseback, crossing in wagons, driving animals across, and other activities. Films were exhibited. Expert witnesses testified, including persons with experience as pilots of river craft. And reports, records, and documents were placed in the record. According to these various types of evidence the weight to which it thought they were appropriately entitled, the court made these findings, among others. Except as noted in the findings, the river in the area in question has not changed its general characteristics since 1879. The river is unstable. It flows through a broad, sandy, flood plain which is from 1,000 to 5,000 feet wide and which is encased between rocky cliffs or steep slopes. The average slope of the river exceeds seven feet per mile. The river is exceedingly irregular in flow. By reason of the flat and sandy nature of the flood plain, the irregularity in flow, and the

rate of fall, the river is constantly shifting its channels. It runs in a single channel for only a short distance and generally has braided channels. For most of the time and most of the distance in question, it runs in from two to many channels at the same time; and none of such cannels presents an adequate or continuous channel for the passage of boats. The flow is generally low for most of the months of the year. On more than one occasion when the river ran dry, fish died in pools; and Indians found it necessary to dig in the river bed to secure water for themselves and their animals. Indians crossed the river frequently, usually on foot or on horseback; but they made and used small boats for ferrying purposes in going to and returning from trading posts. There was a gold rush along the river in about 1892 and 1893. Several hundred prospectors came into the country in search of gold. Most of them went along the stream to the point or points of activities by horseback, by burro, or by wagon; and most of their supplies were taken there in that manner. A few of the prospectors went downstream in small rowboats constructed locally and took with them small amounts of supplies, bedrolls, and equipment. None of them came upstream in boats. The record as a whole makes it clear that the court in its grapple with the ultimate question of navigability was sensitive to the general rule for determining the question; and that in reaching its conclusion upon the question, the court gave consideration to the several factors which threw light upon the question. The findings are adequately supported by the evidence and are not plainly wrong, due consideration being given to the opportunity of the court to observe the witnesses, to weigh their credibility, and to weigh their testimony, particularly the recollections of aged persons re-

lating to long-past conditions and events. In United States v. Appalchian Electric Power Co., supra, it was stated that in some cases involving the navigability of a water course, the court entered into consideration of the facts found below to determine for itself whether the proper legal tests had been applied to the facts found. We have exercised that function in this case. We think the trial court applied the proper legal tests to the facts found; and moreover, we share with the trial court the view that the part of the river in question was in fact and in law non-navigable at the time Utah was admitted into the Union.

The findings of fact are challenged on the ground that they fail to meet the requirements of Federal Rules of Civil Procedure 52(a), 28 U.S.C., which provides in presently pertinent part that in actions tried upon the facts without a jury, the court shall state the facts specially. It is argued that the findings consist of elaborate dissertations upon various isolated bits of evidence, erroneous statements of other items of evidence, exaggerated description of events, contortions of various incidents, and inaccurate and misleading comparisons of the San Juan River with other rivers; and that they fail to disclose how the court arrived at its decision. The intended purpose of the rule is to aid the appellate court in acquiring a clear understanding of the basis of the decision of the trial court. Tulsa City Lines v. Mains, 107 F. (2d) 377; United States v. Horsfall, 270 F. (2d) 107. We think the findings meet the requirements of the rule and therefore are not open to the criticism directed against them.

Complaint is made that the court erred in taxing costs against Utah. It is argued that being a sovereign state,

Utah was immunized from liability for costs. It is the general rule that in the absence of an authorizing constitutional or statutory provision, a state court may not tax costs against the State. But this case was not in a state court. It was in the United States Court for Utah. Utah was a party litigant as a defendant and as a cross-complainant. The court had jurisdiction of the cause and of the parties. The incidents of the hearing in the exercise of the jurisdiction of the court included power to tax costs. And in such circumstances, the attributes of sovereignty did not immunize the State against the taxing of costs against it. Fairmount Creamery Co. v. Minnesota, 275 U.S. 70. And it is further argued that the other defendants were not necessary parties to the litigation and therefore costs should not have been taxed against them. These parties asserted mineral interests in the lands in the river bed, and they sought judgment quieting their title to such interests. Except as otherwise provided by statute, the taxing of costs rests in the sound judicial discretion of the trial court, and the exercise of such discretion will not be disturbed on appeal except in case of abuse. Crutcher v. Joyce, 146 F. (2d) 518; T. & M. Transportation Co. v. S. W. Shattuck Chemical Co., 158 F. (2d) 909; Euler v. Waller, 295 F. (2d) 765. There was no abuse of discretion in this instance.

The judgment is

AFFIRMED.

APPENDIX B

Judgment

Twenty-Ninth Day, March Term, Thursday

May 10th, 1962

Before Honorable Sam G. Bratton, Honorable Walter A. Huxman and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Utah and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

BRIEF FOR THE UNITED STATES IN OPPOSITION

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 24 1962
JOHN F. DAVIS, CLERK

No. 304

In the Supreme Court of the United States

October Term, 1962

STATE OF UTAH, GEORGE D. FEHR, EARL E. FEHR, JOE LOOS, JR., and UNITED WESTERN MINERALS COMPANY, a corporation, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX
Solicitor General,
ROGER P. MARQUIS,
M. HUDSON HOCHMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 284

STATE OF UTAH, GEORGE D. FEHR, EARL E. FEHR, JOE LYON, JR., and UNITED WESTERN MINERALS COMPANY, a corporation, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-7a) has not yet been reported. The findings of fact and conclusions of law of the district court are found at pages 17-29 of the printed record in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1962 (Pet. App. B, 8a). The petition

for a writ of certiorari was filed on July 30, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the San Juan River from Chinle Creek in Utah to the Colorado state line was a non-navigable stream on January 4, 1896, the date on which Utah was admitted to the Union.

STATEMENT

This is an action to quiet title in which the United States claims ownership of the bed of the San Juan River in Utah between Chinle Creek and the Utah-Colorado boundary, subject to the rights of the Navajo Indian Tribe under specified executive orders and acts of Congress, its grantees, and the rights of riparian landowners (R. 4). The State of Utah claimed ownership of the bed of the San Juan River subject only to mineral leases it has issued to the other petitioners (R. 5).

The original title of the United States under the Treaty of Guadalupe Hidalgo of February 2, 1848, 9 Stat. 922, was stipulated (R. 12). All parties agreed that the first issue to be decided was whether any significant part of the San Juan River in the disputed area was navigable when Utah became a

---

[1] The interest of the Navajo Tribe arises by virtue of treaties, executive orders and acts of Congress, which resulted in the establishment of the Navajo Reservation with a boundary extending to the middle channel of the San Juan River (R. 13).

state (R. 14-15). If not, the State could claim no title to the river bed lands. After trial of the issue of navigability, the district court held (R. 28):

> The San Juan River between the Utah-Colorado boundary and Chinle Creek, * * * on the date of Utah's statehood, January 4, 1896, was not a "navigable" water within the legal meaning and definition of the term "navigable" as applicable to a determination of the question of whether or not state title attaches to river bed lands within the several states.

The district court made extensive findings of fact and conclusions of law which summarized the great volume of testimony, depositions and exhibits presented in evidence at the trial (R. 17-29). The principal findings show that in the 55-mile area in controversy, the San Juan River has a substantially uniform rate of fall of seven feet per mile (R. 19-20). The fall here is comparable to the fall in the 133-mile downstream segment of the San Juan which was held non-navigable in *United States* v. *Utah*, 283 U.S. 64 (R. 20).

In the area in controversy, the San Juan flows through a broad, sandy flood plain which is from 1,000 to 5,000 feet wide (R. 20). Because of the nature of the flood plain, the irregular flow and the gradient, the river is constantly shifting its channels. Many times the channel has moved more than one-half mile in a very short period. The river in this area generally has braided channels and runs in a single channel only for very short distances. None

of the several channels presents an adequate or continuing channel for the passage of boats. "The testimony * * * showed considerable difficulty in this regard even at high stages of water and in modern shallow-draft small rubber rafts and small plastic glass motorboats" (R. 20).

The San Juan has an extremely irregular flow (R. 20). On a number of occasions it has run dry, and there is a recorded flood stage of 70,000 cubic feet per second in 1927, with an estimated high in 1911 of 150,000 c.f.s. (R. 20-21). The flow is generally low for most months of the year, running less than 1,000 c.f.s. (R. 21). The big runoff occurs when the snow melts, from April to June. Full flow is, for the most part, confined to this period. There are also flash floods which ordinarily occur in late summer and fall. While the San Juan has a long-time average flow of 3,000 c.f.s., it runs at 1,000 c.f.s. or less 60.9% of the time. It runs in excess of 3,000 c.f.s. only 18.4% of the time. The flow is 500 c.f.s. or less 22% of the time (R. 21).

The district court found the San Juan carried a total sediment load that was twice the amount carried by either the Green or Colorado Rivers in the areas determined to be navigable in United States v. Utah, *supra* (R. 21-22). The density of sediment is even greater, since the volume of flow is only one-third of the Colorado and one-half of the Green. The high sediment content gives rise to sand waves, which sometimes reach a height of 12 feet and present a dangerous obstacle to small boats (R. 22). The average slope of the San Juan in the controverted

area is seven feet per mile in comparison to 1.17 and 1.63 feet per mile on navigable parts of the Green and Colorado (R. 22).

The San Juan River has not changed its general characteristics since white men came to the area in 1879 (R. 23). On various occasions when the river has run dry the Indians found it necessary to dig in the river bed to secure water for themselves and their animals.

The district court made findings on the navigation history of the river (R. 24-26). There was some evidence of small boats being used to ferry persons across the river at trading posts and other points. Some gold miners and oil prospectors had used the river to carry supplies, bedrolls, etc., downstream in small boats. However, almost all of the miners and prospectors, their supplies and equipment were brought into the area on foot, by horse, burro or by wagon. In the past 20 years, two or three "river runners" have used the San Juan for transporting a relatively few passengers downstream for "thrill" purposes. There had been some navigation of the river in preparation for this lawsuit by types of boats not generally available in 1896.

The district court found that (R. 26):

> At low stages, the San Juan River in the area in controversy herein has insufficient water to permit the passage of any but small, rowboat type boats or small rubber rafts and then only downstream with no commercial load and with considerable difficulty. At high stages the San Juan River in the area in controversy herein becomes torrential, cutting and tearing its banks,

> swiftly changing channels, carrying excessive debris and an extremely high sediment load. The high stages of water persist for only relatively short periods of time each year, and the river current is then too swift and too dangerous as well as too uncertain to permit any use of the river for commercial navigation. These same conditions existed in 1896 and have persisted since that time.

Finally, the court found that the wheels, engines, equipment and fuel ordinarily used for boats that carried passengers and freight in 1896 were heavy, cumbersome and occupied a large part of the boat's carrying capacity (R. 26-27). "* * * [I]t would have been impossible to navigate a boat of any substantial size or such as would have been suitable for carrying passengers or freight in the then ordinary and customary mode of travel on water at the time Utah became a state" (R. 27).

In accordance with its determination that the San Juan in the area in controversy was a non-navigable stream, the district court entered judgment quieting title to the bed of the stream in the United States, subject only to the rights of the Navajos and riparian owners claiming under the United States (R. 29-30). Petitioners appealed to the Tenth Circuit and that court affirmed (Pet. App. A, pp. 1a-7a).

ARGUMENT

All the parties to this suit, and both courts, agree on the appropriate legal test of navigability. It is reflected in this Court's formulation in *The Daniel Ball*, 10 Wall. 557, 563:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.[2]

Everyone likewise agrees that this case is governed by the general rule that title to the beds of rivers within a state passes to such state upon its admission into the Union only if the rivers are then navigable. See *United States* v. *Oregon*, 295 U.S. 1, 14; *United States* v. *Utah*, 283 U.S. 64, 75. Accordingly, the only remaining question is whether the courts below correctly applied the legal test to the facts as developed in the trial of this case.

The findings and conclusions of the district court and the opinion of the court of appeals clearly demonstrate that the San Juan River was, in fact, a non-navigable stream when Utah was admitted to the Union. The legal test of navigability was correctly applied. The decision below does not conflict with any decision of this Court nor of any other

[2] This test has often been repeated. See, *e.g.*, *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, where the Court re-examined the question in detail.

circuit court.[3] There is no novel question of federal law involved. There is no conflict with state law. Accordingly, there is no occasion for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
A. DONALD MILEUR,
Attorneys.

AUGUST, 1962

---

[3] Petitioners' assertion that the decision here conflicts with *United States* v. *Utah*, supra, *United States* v. *Appalachian Electric Power Co.*, *supra*, and *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F.2d 743 (C.A. 7), will not bear close examination. All three cases are clearly distinguishable on the question of navigability. It would be pointless to recite all the differences in history, topography and rainfall, justifying the findings of navigability in those cases. But it is worth repeating that in *United States* v. *Utah* a contiguous portion of the San Juan River, here involved, was found non-navigable by the Special Master and that Utah did not except to this finding. *Id.*, at 74.

☆ U. S. GOVERNMENT PRINTING OFFICE 1962 655273 o 189